UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JESSE DREWNIAK, Plaintiff, v. U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, MARK A. QUALTER, U.S. Border Patrol Agent, and ROBERT N. GARCIA, Chief Patrol Agent of Swanton Sector of U.S. Border Patrol, Defendants.	)	Civil No. 1:20-cv-852-LM

PLAINTIFF'S SUR-REPLY IN OPPOSITION TO THE OFFICIAL CAPACITY DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiff Jesse Drewniak hereby submits this sur-reply in opposition to the Motion to Dismiss filed by the Defendants U.S. Customs and Border Protection, U.S. Border Patrol, and Chief Border Patrol Agent Robert N. Garcia (collectively, the "Official Capacity Defendants"). *See* DN 42. Much of the Reply prematurely addresses the merits and raises other irrelevant issues that have no bearing on the fundamental question of whether Mr. Drewniak's alleged injury "is actual or imminent, not conjectural or hypothetical." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).[1] In light of Border Patrol's documented practice of traffic checkpoints along I-93 (South) in New Hampshire, and Mr. Drewniak's detailed history and future plans to travel along that very route, Mr. Drewniak has demonstrated a real and immediate threat of harm from Border Patrol's unconstitutional checkpoints. Accordingly, this Court should deny the motion.

I. The Official Capacity Defendants' Concession that Their Motion to Dismiss Amounts to a "Factual Challenge" on Standing Only Confirms that Their Motion Is Premature and that Discovery Is Necessary.

The Official Capacity Defendants now claim in a footnote that they are raising a "factual challenge" on the question of whether the checkpoints are "actual or imminent." *See* Reply (DN42) 2 n.1. In support of this apparent accuracy challenge, they have relied on the extrinsic and unvetted declaration of Swanton Chief Border Patrol Agent Robert Garcia. This declaration states: "To date [as of November 6, 2020], the Beecher Falls Station has no scheduled immigration

[1] For example, the Official Capacity Defendants attack Mr. Drewniak for "waiting nearly three years to file this case," *see* Reply (DN42), at p. 1, despite the fact that (i) Mr. Drewniak spent one year defending himself in state court as a result of the Official Capacity Defendants' unconstitutional actions and (ii) Border Patrol continued its practice of unconstitutional checkpoints over several years, even after the state court decision finding the August 2017 Checkpoint unconstitutional under the Fourth Amendment. In addition, the Official Capacity Defendants complain that the Plaintiff only alleges "on information and belief" that it was Defendant Qualter who yelled at him. *See* Reply (DN42), at p. 3. While Plaintiff is confident that it was Agent Qualter, this allegation is more than sufficient at this stage. Indeed, it is worth noting that multiple Border Patrol agents were at the scene and there is no indication that Agent Qualter—or any other Border Patrol Agent—verbally identified themselves. Finally, the Official Capacity Defendants question Mr. Drewniak's allegation of Agent Qualter's outburst because "it was never raised during Drewniak's suppression hearing in state court." *See* Reply (DN42), at p. 3, n.3. This signifies nothing. Had Mr. Drewniak testified at the suppression hearing—which he was under no obligation to because he was a criminal defendant and the burden fell on the State—he would have testified to this unprofessional outburst.

checkpoints planned to occur in New Hampshire. The re-initiation of immigration checkpoints is contingent upon operational needs, manpower, and budgetary considerations." Garcia Decl. ¶ 12 (DN 20-2).

The Official Capacity Defendants' reliance on this extrinsic statement only highlights why dismissal is premature and why discovery is necessary. Of course, if the Official Capacity Defendants believe that an extrinsic declaration is needed on this standing question, then Plaintiff should be able to engage in discovery to challenge such declaration and marshal evidence of his own in support of standing. The First Circuit has contemplated this very situation by enabling a district court to exercise its discretion to "order discovery" when an accuracy challenge to standing is presented using extrinsic evidence. *See Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001). Given the sterile and incomplete record that exists in this case, this accuracy challenge would best be addressed after discovery upon the completion of a full record that has been vetted through the adversary process. *See Hollingsworth v. United States*, No. CV-05-80-B-W, 2005 U.S. Dist. LEXIS 33224, at *20 (D. Me. Dec. 14, 2005) (denying without prejudice an accuracy standing challenge, in part, because "[t]o find facts based on the existing filings would require the Court to make evidentiary assessments on a sterile and incomplete record").[2]

II. The Official Capacity Defendants Have Adopted the Challenged Policies and Practices.

A. The Pattern and Practice is Firmly Established, as Evidenced by Regular Enforcement.

The Official Capacity Defendants argue that—unlike the established policies in *Dudley v.*

[2] Plaintiff served the Official Capacity Defendants document requests on February 17, 2021, that specifically seek, in part, the following related to this analysis: (i) "[a]ny and all documents that refer to, reflect, or evidence plans or authorization to conduct future CBP checkpoints in New Hampshire."; and (ii) "[a]ny and all documents that refer to, reflect, or evidence plans or authorization to prohibit future CBP checkpoints in New Hampshire."

Hannaford Bros. Co., 333 F.3d 299, 308 (1st Cir. 2003), and *Berner v. Delahanty*, 129 F.3d 20, 24-25 (1st Cir. 1997)—standing does not exist here because "Mr. Drewniak [has] not shown a 'pervasive practice' or an 'offending policy' that is firmly in place." *See* Reply (DN 42) 5-7. Setting aside the fact that Defendants have not yet produced any discovery that would allow Plaintiff to test this conclusory assertion, Plaintiff has more than adequately alleged the existence of Defendants' policy and practice to erect traffic checkpoints in violation of the Fourth Amendment. *See, e.g.*, Compl. ¶¶ 108-110. Indeed, the August 2017 Checkpoint was one of *ten* checkpoints implemented by the Official Capacity Defendants since August 2017, seven of which occurred in Woodstock, 90 driving miles from the border. *See* Compl. ¶ 48. Most, if not all, of these checkpoints occurred in the same manner as the August 2017 Checkpoint in which Border Patrol agents inspect each vehicle with a canine that is tasked with searching for drugs. *Id.* ¶ 48; *see also id.* ¶¶ 49-50 (noting Border Patrol's seizure of small amounts of drugs during May 26-28, 2018 Memorial Day Weekend checkpoint and June 15-17, 2018 Father's Day Weekend checkpoint, likely through use of canines).

The Official Capacity Defendants also claim that there was insufficient "regular enforcement" to create standing. *See* Reply (DN 42) 7-8; *see also Floyd v. City of New York*, 283 F.R.D. 153, 170 (S.D.N.Y. 2012) ("[T]he frequency of alleged injuries inflicted by the practices at issue … creates a likelihood of future injury sufficient to address any standing concerns."). This also fails. Here, it can hardly be disputed that there has been robust use of checkpoints in New Hampshire since 2017. While the Official Capacity Defendants contend that *Floyd* is different because "the CBP checkpoints at Woodstock do not occur on the same scale or frequency" as the stops in *Floyd*, *see* Reply (DN 42) 8, this distinction is both immaterial and incorrect. The frequency with which checkpoints have occurred in New Hampshire is—as were the stop-and-

frisk encounters in *Floyd*—significant and, as in *Floyd*, they have affected the civil liberties of likely thousands of individuals. In short, if this is not a custom, then nothing is. *See Battle v. City of New York*, No. 11 Civ. 3599, 2012 U.S. Dist. LEXIS 5256, at *10-13 (S.D.N.Y. Jan. 12, 2012) (concluding that standing existed, in part, because there was "an official policy or its equivalent," as "[t]he pleadings suggest a widespread custom or failure to train").[3]

B. Even if this Court Were to Credit, Without Additional Discovery, Chief Patrol Agent Garcia's Unvetted Statement that, as of November 6, 2020, There Were "No Scheduled Immigration Checkpoints," Standing Still Exists.[4]

Even if this Court were to credit, without the benefit of additional discovery, Chief Patrol Agent Garcia's unvetted statement that "[t]o date [as of November 6, 2020], the Beecher Falls Station has no scheduled immigration checkpoints planned to occur in New Hampshire," this single statement is not the "silver bullet" that the Official Capacity Defendants think it is. Indeed, the blanket representations of counsel for the Official Capacity Defendants that the checkpoints have "ceased" and that "[n]o future checkpoint is on the horizon," *see* Reply (DN 42) 2, 8, are not

[3] To the extent Defendants challenge the Plymouth Circuit Court's finding that the primary purpose of the August 2017 Checkpoint was in violation of the Fourth Amendment under *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), that argument is both premature and wrong. *See, e.g.*, Reply at 4-6 (citing cases). Not only are the cited cases at the wrong procedural posture—after trial or evidentiary hearings, as opposed to the pleading stage in this civil case—but they are also distinguishable. *See, e.g.*, *United States v. Tello*, 924 F.3d 782, 787 (5th Cir. 2019) (after trial, addressing whether the stop during the checkpoint became unreasonably prolonged); *United States v. Forbes*, 528 F.3d 1273, 1278 (10th Cir. 2008) (after trial, not addressing the checkpoint's "primary purpose"); *United States v. Taylor*, 934 F.2d 218, 221 (9th Cir. 1991) (after testimonial hearing, not addressing the checkpoint's "primary purpose"); *United States v. Thomas*, 726 F.3d 1086, 1094-95 (9th Cir. 2013) (same); *United States v. Brown*, No. CR 16-01423-TUC-JAS (JR), 2017 U.S. Dist. LEXIS 205765, at *18-22 (D. Ariz. Oct. 3, 2017) (after an evidentiary hearing on a motion to suppress, concluding that a permanent checkpoint 49 miles from the southern border was constitutional based on individualized factors not present here), *adopted in* 2017 U.S. Dist. LEXIS 205535 (D. Ariz. Dec. 13, 2017); *United States v. Ruiz-Hernandez*, No. CR 16-511-TUC-CKJ, 2017 U.S. Dist. LEXIS 38759, at *29-33 (D. Ariz. Mar. 16, 2017) (after an evidentiary hearing on a motion to suppress, concluding that a checkpoint approximately 40-60 miles from the southern border was constitutional based on individualized factors not present here); *United States v. Barajas-Chavez*, 236 F. Supp. 2d 1279, 1283 (D.N.M. 2002) (after an evidentiary hearing, finding that the primary purpose of the checkpoint was verifying drivers' licenses and vehicle registrations); *United States v. Gabriel*, 405 F. Supp. 2d 50, 60-61 (D. Me. 2005) (after an evidentiary hearing, finding that a temporary immigration checkpoint in Maine after September 11 was "to search for 'weapons of mass effect' and the terrorists who may carry them").

[4] Chief Patrol Agent Garcia's repeated reference to "immigration" checkpoints is at odds with the well-pled allegation that the checkpoints were for the purpose of drug interdiction, not to address unlawful entry over the northern border (something that Defendants have not even demonstrated is a significant problem in New Hampshire). *See, e.g.*, Compl. ¶¶ 110.

supported by Chief Garcia's declaration, which expressly preserves the ability of Border Patrol to, in its discretion, conduct an immigration checkpoint without notice at any point in the future based on subjective criteria like "operational needs, manpower, and budgetary considerations." *See* Garcia Decl. ¶ 12 (DN 20-2).

To be sure, while the COVID-19 pandemic may have decreased the frequency of such checkpoints in 2020, the Official Capacity Defendants have never disavowed their policy of implementing such checkpoints or their ability to decide at any moment to conduct a checkpoint with no notice to the public. To the contrary, while Chief Patrol Agent Garcia may not have had the intent to conduct a checkpoint as of November 6, 2020 when he drafted his declaration, Chief Garcia has refused to commit to halt future checkpoint operations in New Hampshire as a matter of policy. Chief Garcia has refused to state that the Woodstock area will not be the site of future checkpoints. And Chief Garcia has refused to state that Border Patrol will not use drug-sniffing canines in all future checkpoints in New Hampshire. Chief Garcia, in fact, makes no promises at all. These omissions can only be viewed as deliberate. Of course, if the Official Capacity Defendants truly will not conduct future immigration checkpoints in New Hampshire, they could say so, establish a formal policy to this effect, or even agree to an injunction. But they have done none of these things. Rather, they have steadfastly defended such checkpoints and expressly left open the option for their future use. As a result, this Court is left to conclude—as in *Dudley* and *Berner*—that there is a substantial likelihood of future violations through the use of checkpoints (and that the Plaintiff is likely to be ensnared in them as explained in Part III *infra*). *See Dudley*, 333 F.3d at 306 (holding that standing existed and "the likelihood of a denial seems substantial" because the policy was "firmly in place," the plaintiff was likely to patronize the defendant's store, the symptoms of the plaintiff's disability mimicked intoxication, three employees of defendant had

previously concluded that the plaintiff was inebriated, and three prior incidents were informative of the defendant's enforcement policy); *Berner*, 129 F.3d at 24 ("The judge, too, remains steadfast in his determination to prohibit attorneys from sporting such pins in his bailiwick."); *see also Smith v. U.S. Immigration & Customs Enf't*, 429 F. Supp. 3d 742, 760 (D. Colo. 2019) (noting that the Standard Operating Procedure is "not the sort of change that 'render[s] the original controversy' over the Fugitive Practice 'a mere abstraction'" (quoting *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992))).

Defendants have not offered to "cease" future traffic checkpoints. But even if they had, it is well established that a defendant's voluntary cessation of a challenged practice does not ordinarily deprive a federal court of its power to determine the legality of the practice. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "If it did, the courts would be compelled to leave 'the defendant . . . free to return to his old ways.'" *Id.* at 289 n.10 (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). Accordingly, where a defendant "argues that its actions after a complaint is filed eliminate the threatened injury upon which the plaintiffs' claim to standing is based, the defendant bears the 'heavy burden' of persuading the court that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *N.H. Lottery Comm'n v. Barr*, 386 F. Supp. 3d 132, 143 (D.N.H. 2019) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)), *aff'd in part and vacated in part on other grounds in* 986 F.3d 38 (1st Cir. 2021). The Official Capacity Defendants have not met this "heavy burden" here when Chief Garcia's post-filing statement concerning whether checkpoints will occur in the future is, at best, cryptic (including with respect to the timing of Defendants' decision-making process) and leaves open the possibility of future checkpoints at any time in the future without public notice.

Finally, it is critical to note that, under the Official Capacity Defendants' theory, effectively *no one* has standing to challenge their use of checkpoints because *no one* can predict with absolute certainty when the Official Capacity Defendants will exercise their subjective discretion in setting up a checkpoint, especially where the checkpoints are set up without advance notice to the public. Here, the Official Capacity Defendants effectively contend that the discretion they have in establishing checkpoints—discretion they claim is based on "operational needs, manpower, and budgetary considerations," *see* Garcia Decl. ¶ 12 (DN 20-2)—prevents a person from having standing to challenge this discretion because no one knows when this discretion will be used. This circular weaponization of a government agency's purported discretion to insulate that agency from judicial review should be concerning. Fortunately, the Official Capacity Defendants' argument is incorrect, especially when considering their prior robust enforcement of checkpoints. Indeed, it is this robust prior usage of checkpoints that has left Mr. Drewniak with the reasonable fear that he could be ensnared in a checkpoint at any time during his frequent travels on I-93 (South).

III. Mr. Drewniak Has Adequately Shown that It Is Sufficiently Likely that He Will Be Exposed to the Challenged Policy and Practice.

Mr. Drewniak has sufficiently pled that he has a "realistic risk of future exposure to the challenged policy," *see Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997), based on his repeated travels to the region. Mr. Drewniak is not a normal traveler. As alleged in the Complaint, he regularly travels to the White Mountains to enjoy all the beauty that the White Mountains have to offer, and he *will* do so in the future. *See* Compl. ¶ 98.

The Official Capacity Defendants attempt to distinguish *Berner v. Delahanty*, 129 F.3d 20 (1st Cir. 1997), and *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299 (1st Cir. 2003), on the ground that the plaintiffs in those cases were "local," where Mr. Drewniak "lives approximately 90 miles from Woodstock" in Hudson. *See* Reply (DN 42) 7. The Defendants also argue that Mr.

Drewniak's travel is for recreation, as opposed to for school, work, or visiting family. *Id.* at 8-9. These distinctions are immaterial. The question for standing is not whether the plaintiff is "local" or works in a particular area, but rather whether there is a "realistic risk of future exposure to the challenged policy." *See Berner*, 129 F.3d at 24. Here, this standard is satisfied where Mr. Drewniak "regularly travels through Woodstock to the White Mountains," *see* Compl. ¶ 98—the very place in which the Official Capacity Defendants have regularly set up immigration checkpoints. *Berner* is instructive here. Like *Berner* where the plaintiff lawyer had standing to challenge a Maine Superior Court judge's allegedly unconstitutional "button ban" because he "regularly handles litigation" before the Maine Superior Court and despite the unpredictability (a 1 in 16 chance) of being assigned the judge with this allegedly unconstitutional policy, Mr. Drewniak has standing because he regularly travels on I-93 South for recreation where the checkpoints routinely occur, despite any unpredictability that may exist with respect to when the Official Capacity Defendants decide to conduct the checkpoints. While the risk of being ensnared in a future checkpoint is not an "absolute certainty," it is nonetheless substantial. *See also Dudley*, 333 F.3d at 306 (holding that, "while there is no absolute certainty that Dudley would be denied the right to purchase alcoholic beverages during a future visit to the Gardiner Shop 'n Save" because of the unpredictability of whether a store clerk would perceive the plaintiff as intoxicated, "the likelihood of a denial seems substantial").

The Official Capacity Defendants also attempt to distinguish *Floyd* on the ground that "the plaintiff in *Floyd* . . . had four stop and frisk encounters with police," where "Mr. Drewniak has had only one encounter with CBP border checkpoints."[5] *See* Reply (DN 42) 8. But "there is no

[5] Defendants' reference to "border" checkpoints conflicts with the fact that the vast majority of these checkpoints are *not* occurring near the border, but instead are at least 90 miles away. *See, e.g.*, Compl. ¶ 108.

per se rule requiring more than one past act . . . as a basis for finding a likelihood of future injury." *Roe v. City of New York*, 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001). *Floyd* echoes this, stating that "[e]ven [a] single stop, in light of the tens of thousands of facially unlawful stops, would likely confer standing." *Floyd*, 283 F.R.D. at 170; *see also Hernandez v. Cremer*, 913 F.2d 230, 235 (5th Cir. 1990) (where the plaintiff was denied entry from Mexico when defendant INS agents suspected his Puerto Rican birth certificate was fake, holding that the plaintiff had standing to challenge on due process grounds the existing procedures for admitting persons claiming to be citizens); *Ligon v. City of N.Y.*, No. 12 Civ. 2274 (SAS), 2013 U.S. Dist. LEXIS 2871, at *110-16 n.317 (S.D.N.Y. Jan. 8, 2013) ("I also note, as I did in *Floyd*, that in light of the frequency of unlawful trespass stops outside TAP buildings in the Bronx, even those plaintiffs who have only been subjected to such a stop one time would likely have standing, provided that they continue to live in or visit TAP buildings."); *Battle*, 2012 U.S. Dist. LEXIS 5256, at *10-13 (concluding that plaintiffs, each of whom had only one alleged wrongful experience with NYPD officers under program involving searches of livery cars, had standing to pursue injunctive relief against NYPD based, in part, on number of cars enrolled in the program and plaintiffs' reliance on such cars).

The Official Capacity Defendants' reliance on *Corbett v. Transportation Security Administration*, 930 F.3d 1225 (11th Cir. 2019), is also to no avail. *See* Reply (DN 42) 9-10. There, the plaintiff did not have standing to challenge certain TSA screening practices, in part, because the plaintiff (i)"has not claimed that he has ever been subjected to mandatory [advanced imaging technology body] screening under the current TSA policy that he is challenging," (ii) has not claimed "that he represents a heightened security risk that would trigger mandatory screening under the policy," and (iii) has not claimed that his boarding pass has ever had a notation indicating that he would be subjected to enhanced screening. *Id.* at 1234-35. Unlike the plaintiff in *Corbett*

who had never been subjected to the challenged practice, Mr. Drewniak has already been the victim of these unconstitutional checkpoints by virtue of his extensive travel on I-93 South. And it is because of this extensive travel that he likely to be subjected to such a checkpoint again. *See Suhre v. Haywood Cty.*, 131 F.3d 1083, 1088 (4th Cir. 1997) ("past injury [i]s probative of likely future injury").

Finally, the Official Capacity Defendants claim that "Mr. Drewniak has not alleged any concrete and specific plans that would bring him into contact with a checkpoint in the Woodstock area." *See* Reply (DN 42) 8-9. This is incorrect. Paragraph 98 of the Complaint makes clear that Mr. Drewniak, consistent with his regular prior travel, "*will travel*" in this area repeatedly in the future. Compl. ¶ 98. These allegations of concrete and specific travel plans are more than enough at the motion to dismiss stage. *See, e.g., Alasaad v. Nielsen*, No. 17-cv-11730-DJC, 2018 U.S. Dist. LEXIS 78783, at *34 (D. Mass. May 9, 2018) (at motion to dismiss stage, plaintiffs' allegations that they regularly travel outside the U.S. for work, visiting friends and family, and engaging in vacation and tourism, and will continue to do so in the future, were sufficient to allege actual or imminent injury to provide standing to challenge ICE's practice of searching electronic devices at ports of entry and, in some instances, confiscating the devices being searched).[6]

[6] *See also Alasaad v. Nielsen*, 419 F. Supp. 3d 142, 151-152 (D. Mass. 2019) (holding that standing existed at summary judgment stage; "Defendants do not press the argument on summary judgment that Plaintiffs lack concrete plans for future international travel, but the Court notes that there is more than sufficient, undisputed evidence in the record as to both the frequency of Plaintiffs' international travel and the specific plans by many of the Plaintiffs to do so in the future."), *reversed on other grounds by, in part, remanded by, vacated on other grounds by, in part, affirmed by, in part* 2021 U.S. App. LEXIS 3586, at *8, n.5 (1st Cir. Mass., Feb. 9, 2021) ("The government does not challenge plaintiffs' standing on appeal.").

Respectfully submitted,

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